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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-511

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; and FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 19, 1973

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on May 25, 1973. A Petition for Rehearing, filed by petitioner, was denied on June 21, 1973.

Opinion and Order Below

The opinion of the Court of Appeals, not yet reported, and the order denying rehearing are reproduced in the Appendix,[1] at 1a and 26a, respectively.

[1] Citations with the suffix "a" are to the Appendix hereto.

Jurisdiction

The opinion and judgment (24a) of the Court of Appeals were entered on May 25, 1973. A timely petition for rehearing, filed by petitioner on June 8, 1973, was denied on June 21, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. This Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), amplified in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), established the conditions under which a public utility may file with the Federal Power Commission higher rates under existing tariff-and-service agreements. Does not the decision below conflict so sharply with those decisions and introduce such confusion into the well settled procedure for the establishment and changing of rates, subject to Commission supervision, as to require the interposition of this Court?

2. When the court below determined to reverse an order of the Federal Power Commission on the basis of facts and theories which had not been litigated before the Commission, was not the court required to remand the proceedings to the Commission, pursuant to §313(b) of the Federal Power Act, for findings of fact by the Commission?

Statutes Involved

This petition involves issues which are required to be resolved under Sections 205, 206, and 313 of the Federal Power Act, pertinent portions of which are set out in the Appendix hereto (50a).

Statement of the Case

The petitions for review below were filed pursuant to §313(b) of the Federal Power Act (the Act). No evidentiary proceedings were had before the Federal Power Commission (Commission); the entire record before the Commission consisted of pleadings, motions and responses thereto.

Indiana & Michigan Electric Company (I&M), a subsidiary of American Electric Power Company, Inc., is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at wholesale for resale and at retail. Richmond and Anderson[2] each operate municipal electric utility departments which, pursuant to service agreement, purchase electric energy at wholesale for distribution to the community. I&M supplies all of Anderson's requirements and part of Richmond's requirements. I&M's service agreements with Richmond and Anderson do not specify a "fixed rate" at which electric energy is sold. Rather, the price term in each agreement refers to a separate "tariff", a "common practice" (8a), and provides for changes in that tariff.

A. The I&M and Anderson Service Agreement.

On April 17, 1957, I&M and Anderson made the service agreement now in force.[3] The price term provides as follows:

> "The Customer [Anderson] hereby agrees to pay the Company [I&M] monthly for electric energy

[2] The municipal electric utility department operated by Anderson, Indiana is known as "Anderson Power & Light of the City of Anderson, Indiana" and that operated by Richmond, Indiana is known as "Richmond Power & Light of the City of Richmond, Indiana."

[3] The service agreement has been supplemented in respects not relevant here.

> delivered hereunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. (a copy of which is attached hereto) [4], as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new tariff incorporate higher rates, the Customer has the option of cancelling the contract prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date of the higher rates."

When this service agreement was made, the Commission had not yet established its jurisdiction over the transaction (18a); thus the agreement was not filed with the Commission. It was, as hereafter explained, later so filed.

B. The Assertion of Commission Jurisdiction.

In 1963 the Commission initiated a proceeding under §201 of the Act to determine whether I&M's sales of electricity to its wholesale customers, including Anderson and Richmond, were subject to Commission jurisdiction. *Indiana & Michigan Electric Co.*, 33 FPC 739, 740 (1965). I&M vigorously contested federal jurisdiction. The Commissioner examiner concluded that each transaction was a "sale at wholesale . . . in interstate commerce" within §201 and thus subject to federal jurisdiction. *Id.*, 795. The Commission affirmed and directed I&M to file as rate

[4] As recited in the service agreement, a document labeled "Tariff I.P.", setting forth, among other things, the rates to be paid, is attached to the agreement.

schedules its agreements with its wholesale customers, including Anderson and Richmond. The Commission added:

> "Such rate schedules shall remain effective until and unless superseded by a change filed pursuant to Section 205(d) of the Act and Section 35.3 of the Regulations thereunder, or changed pursuant to order of this Commission." *Id.*, 751

The Commission refused I&M's motion for a stay of the filing requirement pending appeal, *id.*, 33 FPC 1252, 1253. I&M filed with the Commission its wholesale service agreements, reserving its position that the Commission lacked jurisdiction. On appeal, the Commission was affirmed. *Indiana & Michigan Electric Co.* v. *FPC*, 365 F.2d 180, 183 (CA7), *cert. denied*, 385 U.S. 972 (1966).

C. The I&M and Richmond Service Agreement.

While judicial review of the Commission's jurisdictional decision was being initiated, I&M and Richmond on November 15, 1965 made the service agreement now in force under which I&M supplies a part of Richmond's energy requirements. The price term of that agreement provides as follows:

> "The Customer [Richmond] hereby agrees to pay the Company [I&M] monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as said tariff is in effect; and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such

> rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates."

This service agreement was filed with the Commission, under the reservation previously mentioned.

D. The June 13, 1972 Rate Increase Filing.

On June 13, 1972, I&M filed with the Commission pursuant to §205(d) of the Act supplements to its wholesale rate schedules, with supporting documentation. These supplements increased the rates to wholesale customers.

Richmond and Anderson moved to reject the new rates[5] and later supplemented their moving papers. Before I&M's responses to the supplements were due, the Commission on August 11, 1972, denied the motions, ordered the rates filed, suspended them for five months, and ordered a hearing to determine their lawfulness under regulatory standards. Petitions for rehearing filed by Anderson and Richmond were denied by the Commission on October 6, 1972, the Commission stating that

> "For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission." (40a).

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[5] Motions to reject on contractual grounds were also made by certain rural electric cooperative customers. When these were denied, separate review proceedings were begun, *Indiana Statewide Rural Elec. Cooperative, Inc.* v. *FPC, petition for review filed,* No. 71-2148, CADC, Dec. 1, 1972, and are currently pending.

E. The Judgment of the Court of Appeals.

On May 25, 1973, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wright, reversed the Commission's orders of August 11, 1972 (28a) and October 6, 1972 (39a) on the ground that I&M's rate increases for Anderson and Richmond were barred under the rule of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The court noted that the price term in both agreements followed "common practice" by referring to "a rate tariff of general applicability" (8a). It construed such agreements to bar rate changes, however. It reasoned that since the agreements called for payment pursuant to Tariff I.P. "as long as said tariff is in effect", and since Tariff I.P. was still "in effect" for certain retail customers, I&M was barred from filing any rate increase except one which came within the current limits of Tariff I.P. Thus, as the court read the service agreements, they guarantee Richmond and Anderson "parity" in rates with any person buying power under Tariff I.P.

Moreover, since Tariff I.P. is the rate applied to some state-regulated sales to retail industrial customers,[6] the court concluded that no change in Richmond's and Anderson's rates could be made until the state regulatory agency, the Public Service Commission of Indiana (PSCI), acted to raise or eliminate Tariff I.P. In other words, PSCI was empowered, in the court's view, to establish a ceiling on the rates which I&M could charge to Anderson and Richmond, despite the fact that I&M's service agreements with them are subject only to federal jurisdiction.

A "competitive squeeze" theory, pressed mainly by Richmond, appears to have influenced the court below to adopt its "parity" construction. The court found as a fact

[6] I&M in fact serves only seven industrial customers under Tariff I.P.

that Tariff I.P. was "the same tariff as that used by I&M for its own industrial retail customers" (15a.). And it also found that the two cities would be unable to compete for such industrial retail customers if the cities had to buy power at a wholesale rate higher than Tariff I.P. The court found that "parity" would relieve this "competitive squeeze" and therefore read "parity" into the agreements, explicitly phrasing its conclusion in terms of the parties' "intent":

> ". . . Anderson, like Richmond, intended to key its rates to those charged by I&M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond." (22a)
>
> * * * * *
>
> "The parties to both the Richmond and the Anderson contracts intended that the municipal buyers receive electricity under the same tariff that governed I&M's industrial retail customers." (23a)

The court ordered the Commission to reject I&M's filing and to initiate proceedings for the refund of the incremental amounts collected.

Reasons for Granting the Writ

The argument that follows demonstrates: (1) that the ruling of the court below directly conflicts with decisions of this Court; and (2) that the disposition below departs from the accepted and usual course of judicial proceedings, because it is predicated on findings of fact for which there is absolutely no support in the record, findings made solely by the court below on appeal without the benefit of findings by the Commission, as required by law.

POINT I

The decision below conflicts with the holdings of this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958)

This Court, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* and in *FPC* v. *Sierra Pacific Power Co., supra* (hereinafter jointly referred to as *"Sierra-Mobile"*), ruled that a utility subject to the provisions of the Natural Gas Act or the Federal Power Act has the right "to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." *Mobile, supra,* 343. Thus, under *Sierra-Mobile,* only if a utility has made a "fixed rate" contract to provide service and has bargained away its right to change such rate, is the utility barred from altering the rate by unilaterally filing a rate increase under §205.

Despite these clear teachings, this Court, two terms later, was required to reexplain the *Sierra-Mobile* rule, in reversing the court below. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958) (*Memphis*). *Memphis* involved several similar agreements which, as this Court noted, were typical "tariff-and-service" agreements under which

> "the agreement between buyer and seller does not itself contain a price term, but rather refers to rate schedules of general applicability on file with the Commission." *Memphis, supra,* 115 n.8.

The service agreements in *Memphis* contemplated changes in rates during their term:

> "'All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], *or any effective superseding rate schedules* on file with the Federal Power Commission . . .'," *Memphis, supra,* 105 (italics original).

The Commission accordingly had accepted new rate filings, but, on appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered them rejected. *Memphis Light, Gas & Water Division* v. *FPC,* 250 F.2d 402 (CADC 1957).

This Court reversed, holding that the court below had "misconceived the import of our decision in *Mobile,*" *Memphis, supra,* 109. The agreements in *Memphis* were "vitally different", *id.,* 110, from those in *Mobile,* this Court explained. Since they made reference to an initial rate schedule but also called for the application of "any effective superseding rate," they put no restriction on the utility's right

> "to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act." *Id.*

Thus *Mobile* imposed no bar:

> "In such circumstances there is nothing in *Mobile* which suggests that United was not entitled to file its new schedules under §4(d), or that the Commission had no jurisdiction to consider them under §4(e)." *Id.*

In further distinguishing *Memphis* from *Mobile,* this Court also stated:

> "[U]ntil this case no one connected with the industry seems to have thought that agreements of this sort precluded natural gas companies from changing their rates in accordance with and subject to §4(d) and (e) procedures; and . . . the respondents' present contrary contentions had their sole genesis in a mistaken view of our decision in the *Mobile* case." *Memphis, supra,* 115 (footnote omitted).

Here neither Anderson nor Richmond has ever contended that they had "fixed rate" contracts like those in *Sierra-Mobile,* and the Commission and the court below did not find otherwise (35a, 14a). Just as in *Memphis,* these service agreements specifically provide for changes in rates.[7]

The language of each agreement here could hardly state more explicitly the parties' understanding that service would commence under the rates in the tariff referred to, but that the tariff might be "replaced by a new tariff incorporating higher or lower rates," whereupon the initial tariff would no longer be "in effect". Service would then continue under the new rates, subject to the customer's option to cancel. No conditions at all are placed on the recognized possibility that the initial tariff might be "replaced" by a "new tariff". Yet the court below held that I&M's proposed new rates were barred by contract. In *Memphis,* this Court held that nearly identical words "left [the utility] free to change its rates from time to time," *Memphis, supra,* 110, subject to Commission review.

The ruling below develops a theory which conflicts with the express holding of this Court in *Memphis* by erecting a *Sierra-Mobile* barrier to rate changes under any "tariff-and-service" agreement referring to "a rate schedule of

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[7] The price terms of the Anderson and Richmond service agreements are set forth, respectively, at p. 3 and p. 5 *supra.*

general applicability". Since the court below observed that such agreements are "common practice" (8a), and since this Court in *Memphis* noted that such agreements are "typical" and even required under Natural Gas Act regulations, *Memphis, supra,* 115 & n.8, the impact of the ruling below is broad indeed. It will affect I&M and other utilities subject to federal jurisdiction, as is already becoming apparent. See, *Kentucky Utilities Co.,* Docket No. E-8172 (F.P.C., Aug. 6, 1973) (slip op. at 3), and (F.P.C., Aug. 22, 1973) (slip op. at 2-3); *Gulf States Utilities Co.,* Docket No. E-8121 (F.P.C., Aug. 7, 1973) (slip op. at 5); *Southern California Edison Co.,* Docket No. E-8176 (F.P.C., Aug. 29, 1973) (slip op. at 1).

The "parity" theory, confected by the court below in an attempt to avoid the force of *Memphis,* holds that the contractual references to "Tariff I.P." bound I&M to maintain service throughout the term of the agreement at the same rate at which I&M sells power to its industrial retail customers, since Tariff I.P. supposedly applied to such customers.[8] Thus any rate higher than the current industrial rate, under the parity theory, is unlawful and must be rejected. This analysis of I&M's service agreements is unsupported by any facts in the record, as will hereafter appear (see, Point II, *infra*).

But most important here is the universal applicability of the parity theory, the "plausible explanation" (12a) which the court below accepted. Richmond and Anderson showed merely that they had typical tariff-and-service agreements; argued that the initial tariff was applicable to some other customers; and urged that they had "an interest" in paying no more than those other customers who were served under the same tariff. Their "competitive squeeze" argument, made without any factual support, is

[8] I&M serves approximately 370 industrial retail customers in Indiana, of which only seven are served under Tariff I.P. Other tariffs available to industrial customers include: C.P., Q.P., D.P., D.P.-2, D.P.-3, and E.C.P., all of which are currently on file with PSCI.

only a variation on the universal theme that a customer always has "an interest" in avoiding a rate increase. The reasoning adopted by the court below can therefore be urged with equal force by any party to a typical tariff-and-service agreement to prevent the Commission from accepting for filing rate changes which this Court ruled in *Memphis* are permissible.

This Court rejected similar arguments in *Memphis*. There, the customers argued that their agreement to purchase gas at a designated rate "or any effective superseding rate" permitted a new rate filing only if the Commission first held a hearing under §5(a) of the Natural Gas Act, determined that a new rate should apply, and thus made it "effective" to "supersede" the old rate. Brief of Memphis Light, Gas & Water Division, *et al.*, 49-53. This Court flatly rejected that claim, *Memphis, supra,* 115-16 n.10, holding that the utility had the right *acting alone* to make a new rate "effective", so that it "superseded" the initial rate.

In square conflict with *Memphis,* the decision below holds that rates cannot be raised for Anderson and Richmond unless they are first similarly raised for various third-party industrial customers. Moreover, this new barrier requires I&M first to obtain approval from PSCI for rate increases which are subject solely to Commission jurisdiction. Such additional conditions on the filing of a rate increase are precisely what was rejected in *Memphis* by this Court.

Indeed the effect of the ruling below is to confer jurisdiction upon a state regulatory agency to determine rates for wholesale sales which are not subject to its jurisdiction. But clearly the states have no power to regulate rates in such transactions. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); Cf., *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44

(1955); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 681 (1954). Nor may private agreements be used to vest a state with jurisdiction over sales subject to federal regulation. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

Among its more invidious effects, the opinion below upsets the very uniformity of federal regulation which Anderson and Richmond sought and won in the Commission's 1965 jurisdictional decision.[9]

The "parity" argument adopted by the court below to qualify rights established by *Memphis* has been rejected by the Commission as contrary to industry practice. In *Atlantic Seaboard Corp.*, 28 F.P.C. 860 (1962), the utility filed new gas tariffs applying for the first time different rates for partial requirements purchasers from those for full requirements purchasers. All of the agreements, as in *Memphis*, called for service at a designated tariff "or any effective superseding rate schedule." *Id.*, 862. The hear-

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[9] Anderson and Richmond, as members of the Indiana Municipal Electric Association ("IMEA"), participated in the 1964 proceedings which established Commission jurisdiction. *Indiana & Mich. Elec. Co.*, *supra*, 33 F.P.C. at 748 (1965). IMEA adopted the Commission staff's arguments in favor of federal jurisdiction and stressed in particular the need for national uniformity in rate regulation:

> "The proper forum for effective regulation of the rates at wholesale for resale to Indiana Michigan's municipal purchasers is the Federal Power Commission, and it is in the public interest that jurisdiction be determined and appropriate rate schedules be filed by Indiana Michigan with the Commission at the earliest date.
>
> * * * * *
>
> "Proper rates for wholesale sales within American Electric's system area must be established by the Federal Power Commission. State regulation will necessarily mean different rates to the same class of customer, with accompanying economic disadvantages, even where costs are truly system costs, which should be allocated as such." Brief of IMEA, 2 (August 24, 1964)

ing examiner rejected the filing on the ground that the initial uniform rate had not been effectively "superseded", *id.*, 880-81, since it was still in effect as to some customers. The Commission reversed:

> "It is apparently the form of the filing as separate rate schedules which has given rise to the *Mobile-Memphis* question. While it is undoubtedly true that the [partial requirements] customers of Columbia will have to enter into new service agreements under the new rate schedules, the schedules themselves are covered by the phrase 'or any effective superseding rate schedule,' and there was no need to obtain the consent of the customers to file these tariff changes." 28 F.P.C. at 862.[10]

Thus *Memphis* imposes no "parity" condition on the right to make a new rate "effective" for a particular customer, whether or not the initial rate has been "superseded" as to other customers. Rather it flatly holds that the seller is "left . . . free to change its rates," *Memphis, supra,* 110. The Commission has interpreted the Act, in the light *Memphis,* to permit rate filings such as I&M made, under similar tariff-and-service agreements. On familiar principles, the agency's interpretation of the statute under which it operates should be given great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); accord: *Power Reactor Development Co.* v. *Electricians' Union,* 367 U.S. 396, 408 (1961); *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153 (1946); *Gray* v. *Powell,* 314 U.S. 402 (1941).[11]

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[10] This ruling was affirmed on rehearing, 28 F.P.C. 882, and was not challenged in subsequent judicial review, *Lynchburg Gas Co.* v. *FPC,* 336 F.2d 942 (CADC 1964). Significantly, after the 1962 ruling by the Commission in *Atlantic Seaboard,* rejecting the parity theory, the Anderson contract was regularly extended and the Richmond contract was executed.

[11] Nor is the Commission hostile to "fixed rate" contracts or to the rule of *Sierra-Mobile* as the opinion below implies (10a n.8, 15a);

The "parity" theory, embraced by the court bel
plainly conflicts with *Sierra-Mobile* and *Memphis*. T
court's error affects not only this petitioner but countl
other utilities whose agreements, like those here, are typi
of the tariff-and-service agreements found throughout t
public utility industry.[12] The error affects suppliers a
customers alike. It introduces widespread confusion ir
the industry, restricts the contractual rights of utilities a
the statutory authority of the Commission in a way whi
bears no relation to the purpose of the Act, and thus ita
cizes the need for review by this Court.

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rather it takes extreme care to honor rights which have been esta
lished by contract. Thus, in *St. Michaels Util. Comm'n* v. *Easte
Shore Pub. Serv. Co.*, 31 F.P.C. 1161 (1964), the Commissio
enforced a contract which provided that the customer should "aut
matically receive the advantage" of "any changes made in [the Con
pany's] Resale Service Schedule which would reduce the charges t
Customer", *id.*, 1163. In explicit reliance on *Sierra*, the Commissio
directed the seller to give the customer the advantage of its lower ra
schedule which purported to apply to all wholesale customers uncon
ditionally, *id.*, 1164-65.

[12] Following the decision of this Court in *FPC* v. *Southern Calif
Edison Co.*, 376 U.S. 205 (1964), and subsequent similar decisions
hundreds of wholesale electric contracts were filed with the Commis
sion. As chronicled in the Commission's Annual Reports, over 60
companies filed their wholesale contracts with the Commission in
the summer of 1964, 44 FPC ANN. REP. 85n.1 (1964); such filings
increased in 1965, so that 80% of the electric utilities had filed all of
their wholesale contracts, 45 FPC ANN. REP. 86 (1965); and ap-
proximately 350 additional wholesale contract filings were made in
1966, 46 FPC ANN. REP. 90 (1966).

POINT II

The decision below represents a clear departure from the accepted and usual course of administrative review and calls for the exercise of this Court's power of supervision

The Federal Power Act provides in §313(b):

> "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

It appeared, during oral argument below, that the "parity" argument, totally unexplored by any of the parties in the proceedings before the Commission, bulked large in the view of the court below and would be a material fact in the court's resolution of the issues posed to it.[13] Counsel for I&M accordingly requested the court to remand these proceedings to the Commission for the taking of evidence on the issue. See, *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 611 n.1 (CA2 1965), *cert. denied*, 384 U.S. 941 (1966).

There is nothing on the face of I&M's service agreements with Anderson or Richmond which suggests a covenant by it to maintain its wholesale rates at "parity" with its rates

[13] Anderson, on brief to the court below, had argued, without conceding the fact (Br. at 38 *et seq.*), that if doubt existed as to the application of the *Sierra-Mobile* rule, "the case should be remanded to the Commission for fact-finding . . ."

to retail customers. The court below read "parity" into those agreements without any proper basis for so doing. In an effort to justify its holding the Court below stated as "fact" the following points, among others:

1. I&M sells power to "many" retail industrial customers at Tariff I.P. rates (8a).

2. If Anderson and Richmond can buy power at Tariff I.P. they will be able to offer power to retail industrial customers at prices competitive with I&M (13a).

3. If I&M can charge Anderson and Richmond rates other than Tariff I.P., "I&M could offer a lower price to its industrial retail customers" (13a).

None of these "facts" is supported by any evidence, nor were they even considered by the Commission. Due regard for the fact-finding responsibility of the Commission, under the Act and as a matter of sound administrative procedure, required the court below, as it has done in other cases, to remand the proceeding to the Commission to develop the pertinent facts. In *Portsmouth Gas Co.* v. *FPC*, 247 F.2d 90 (CADC 1957), the court held that judicial review could not begin until

> "the basic facts, about which we cannot speculate, have been found by the Commission.
>
> "We think it essential that the record show the Commission's judgment—and its reasons for reaching it—as to the exact legally effective terms and conditions of the contract, if any, between United Fuel and Portsmouth as the same existed immediately prior to the entry of the order under review. While we may on occasion judicially notice Commission orders, we think it impractical and therefore improper to do so in this case, where the effect or validity of several orders may depend on the nature of the proceedings in which they were entered, and

> where conclusions must be reached, from numerous orders and proceedings and perhaps from the conduct of the parties—conclusions which should be made in the first instance by the Commission." *Id.*, 94.

Accord: *City of Lancaster* v. *FPC*, 252 F.2d 631, 633 (CADC 1958); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437, 444 (CADC 1949).

Here the court of appeals adopted and acted on an "explanation" of the Anderson and Richmond agreements which it characterized only as "plausible" (12a), but which in fact is wholly unsupported by the record. Similar cases show that whether any "competitive squeeze" exists, and whether "parity" will cure it, cannot be assumed but depends on a full analysis of numerous factors which have not been touched on here. *Shrewsbury Municipal Light Department* v. *New England Power Co.*, 32 F.P.C. 373, 377 (1964); *Duke Power Co.*, Docket No. E-7557 (F.P.C., Feb. 2, 1972) (slip op. at 24-27), *aff'd and modified on other grounds* (F.P.C., Dec. 18, 1972) (Opinion No. 641). Moreover, while Richmond on brief to the court below mentioned its "104 industrial customers", Richmond Reply Br. at 24, and its hopes of attracting "new industrial loads", *id.*, it totally refrained from stating whether *any* such customers are or might be served under rates similar to Tariff I.P. If not, Richmond's argument for rate parity would, of course, collapse. But on this record, such facts are totally unknown, and the opinion below lacks any underpinning.

One other "fact" may have swayed the court below, although it concerns only Richmond and would not explain the Anderson holding. The court found that when the Richmond agreement was made the parties had "full knowledge" that the Commission had jurisdiction over the sale[14] even though the issue was still in litigation. Thus,

[14] In so doing, the court erroneously cited (11a) a Commission finding which did not involve the Richmond contract (compare, 34a), and then rejected the finding as "factually incorrect" (11a).

the court read the term calling for payment at "Company's Tariff I.P. as regularly filed with [PSCI]" as evidence of an intent to keep rates in "parity" with the state-regulated Tariff I.P. (12a) There is no evidence of the parties' knowledge or intent in this case. Moreover, the reference to a tariff which was "regularly filed" with the state commission needs no such complex explanation. The language merely recites compliance with Indiana law, which only permits public utilities to charge rates which are currently on file, see, IND. ANN. STAT. §§54-313, 54-319. Thus it simply shows that the agreement is lawful; if the rate had not been so filed, performance of the agreement might be enjoinable at the instance of a taxpayer. *Rice* v. *City of Indianapolis*, 183 Ind. 203, 108 N.E. 584 (1915).

I&M's showing, both in its original presentation and on motion for reargument, that there is a total absence of factual basis for the "parity" theory clearly established "reasonable grounds", §313(b), requiring a remand to the Commission for fact-findings. Prior to the Commission's August 11, 1972 order, no party had claimed that these typical tariff-and-service agreements were intended to create "parity" between wholesale and industrial rates. Richmond, in its petition to the Commission for rehearing, made the wholly new contention that its agreement "guaranteed that for a period of at least ten years it would pay no higher rates than I&M's retail industrial customers."[15] It offered no proof. Under Commission rules I&M was precluded from responding to Richmond's new claim, 18 C.F.R. §1.34(d) (1973), and the Commission's order of October 6, 1972, denying Richmond's petition for rehearing, made argument on the point unnecessary. Fair

[15] Anderson never made a "parity" argument until it filed its reply brief with the court below, and then its argument was at best subliminal, Anderson Reply Br. at 11. Certainly its late claim was not the equivalent of a Commission finding.

practice (see, Administrative Procedure Act, 5 U.S.C. §554(b)(3)) forbids the Commission to dispose of a case on a new theory on which a party has had no opportunity to present evidence, *American Louisiana Pipe Line Co.* v. *FPC*, 344 F.2d 525 (CADC 1965); *Hill* v. *FPC*, 335 F.2d 355 (CA5 1964); *Bel Oil Corp.* v. *FPC*, 255 F.2d 548 (CA5 1958); *a fortiori* a reviewing court cannot do so. But the error here is even more striking: it is based both on a new theory and on purported facts which are not even in the record. Nothing justified the court in dignifying Richmond's tardy claim to "parity" as if it were a finding of fact by the Commission. If the court saw any substance in the "parity" theory, it had no choice but to remand for findings on the points it thought pertinent:

> "When the court's view of law or policy differs from that of the agency, the agency's findings often fail to answer the questions the court deems crucial, and the only proper disposition the court can make of the case is a remand to the agency so that the needed answers can be supplied." 2 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE 436 (1958).

This Court recently stressed the importance of this principle of orderly administrative review in its summary reversal in *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968). The decision below completely disregards not only the principle but this Court's recent application of it in a case involving the same Commission. Indeed, the court below adopted another novel theory and made original fact-findings in an effort to support its holding. The Commission thought the I&M-Anderson service agreement permitted new rate filings in part because, when it was made in 1957, the parties contemplated rate changes under state regulation (34a). Without disputing that fact, the court said such approach was "beside the point" (20a). Rather, it held, the issue was what procedural requirements the

parties intended would apply to rate changes. It believed that Indiana law permitted rate changes only after investigation, hearing, and final approval by PSCI (22a). It found as a fact that the parties "never contemplated" (20a) that I&M could change its rates "simply by filing a new tariff" (20a; 22a), and it held that the current filing must be rejected.

The court's new legal theory was not urged by any party at any stage of the case, and of course there was no evidence and no agency fact-findings as to the rate changing procedures that the parties "contemplated." Furthermore, the court's findings, made without the aid of counsel, are based on a complete misreading of Indiana law. Rather than prohibiting rate changes without a full hearing and final approval, Indiana law specifically authorizes PSCI to make temporary rate changes simply by finding it "necessary" and declaring an "emergency" to exist. IND. ANN. STAT. §54-712; see also, IND. ANN. STAT. §54-423. Thus it can direct energy buyers to pay an interim surcharge pending hearing and decision on rates. *Boone County Rural Electric Membership Cooperative* v. *Public Service Commission*, 239 Ind. 525, 529-30, 159 N.E.2d 121, 123 (1959); see also, *Twin City Realty Corp.* v. *Clay Utilities, Inc.*, 146 Ind. App. 629, 642-43, 257 N.E.2d 686, 694 (1970).

Moreover, the ruling that PSCI rate changing procedures must be followed now, even though the service agreement is admittedly subject to Commission jurisdiction, engrafts the procedural rules of one agency onto an entirely different agency, and it imports into future Commission proceedings the regulatory law of fifty states, completely sacrificing federal uniformity. The decision below, for instance, has extended the five-month suspension period specified in §205(e) of the Act to include whatever time it takes the Commission to hold a hearing and finally approve the new rates. But the Commission has often

dealt with agreements between utilities and customers who thought they were subject to state regulation. And in such cases it has consistently been able to preserve the expectations of both parties without abandoning the Congressionally mandated plan for the application of federal jurisdiction. See, *e.g., Carolina Power & Light Co.*, 47 F.P.C. 1, 21-25 (1972); *Detroit Edison Co.*, 47 F.P.C. 130, 131 (1972); *Southern California Edison Co.*, 45 F.P.C. 1021 (1971), *appeal pending; Public Service Co. of Indiana*, Docket No. E-7645 (F.P.C., Feb. 25, 1972), *rehearing denied* (F.P.C., May 25, 1972); cf., *Central Telephone & Utilities Corp.*, 45 F.P.C. 971, 973 (1971), *modified on other grounds*, 47 F.P.C. 60 (1972).

The court below not only acted without the help of Commission findings but it also disregarded Commission experience in applying the language of utility agreements, a necessary part of its administrative duties. The reversal of the Commission here represents a clear departure from the accepted and regular course of judicial procedure. This excursion by the court below into new fields without benefit of Commission findings, and contrary to established precedent, requires that this case be reviewed here.

Conclusion

The decision of the court below flies in the face of *Sierra-Mobile* and *Memphis*. The right of utilities to change their rate schedules, when that right is reserved, is now narrowly restricted, contrary to the result contemplated by this Court. Review by this Court is necessary to restore the authority of its decisions in this field.

The court below also insisted upon reaching final decision without findings of fact on the subjects involved, contrary to Congressional mandate. That court likewise disregarded a consistent series of interpretations by the Commission. That court took the bit in its teeth to the point where accepted and usual standards of administrative review were

so completely disregarded that review here is essential to the restoration of order in the process of administrative review.

We take the liberty of suggesting that if this Court should consider the errors below so clear as not to require the Court to place this case on its calendar for oral argument, this matter could be effectively handled by summary reversal, as was done in *F.P.C.* v. *United Gas Pipe Line Co., supra,* with appropriate directions to the court below, including a remand to the Commission for proper findings of fact.

Respectfully submitted,

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